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No. 93-1469

In the Supreme Court of the United States

OCTOBER TERM, 1993

FOXWOOD MANAGEMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the court of appeals properly determined that the failure of the Federal Deposit Insurance Corporation, acting as a receiver, to serve each of the petitioners with its motion for summary judgment could be excused as harmless error where all of petitioners' claims were rendered moot by the insolvency of the estate against which those claims were brought.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is unpublished, but the decision is noted at 15 F.3d 180 (Table). The orders of the district court (Pet. App. B1-B4, C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1994. A petition for rehearing was denied on February 9, 1994. Pet. App. E1-E2. The petition for a writ of certiorari was filed on March 18, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Foxwood Management Company is a Texas general partnership that is a general partner in another partnership named Foxwood Properties Ltd. #1. Petitioners Charles L. Sowell and Jack C. Ogg are general partners in Foxwood Management. On January 11, 1980, Foxwood Properties executed a promissory note payable to Gibraltar Savings Association in the original principal amount of $2,300,000; petitioners' obligations under the note were secured by a deed of trust on certain real property, as well as by personal guaranties of petitioners Sowell and Ogg. Petitioners defaulted on the note in 1985, and Gibraltar Savings conducted a nonjudicial foreclosure sale of the collateral in 1986, which reduced the outstanding balance of the note to about $1,500,000. In 1987, Gibraltar Savings filed suit against petitioners in a Texas state court seeking to recover the balance due under the note. Petitioners raised a variety of defenses, as well as counterclaims resting on, among other things, the Texas Deceptive Trade Practices Act and common-law remedies for wrongful foreclosure. See Pet. App. A2-A5, C2.

In December of 1988, Gibraltar Savings was declared insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed as receiver. Acting as receiver, FSLIC transferred substantially all of Gibraltar Savings' assets (including the promissory note involved here) to First Gibraltar Bank, but retained responsibility for the counterclaims and defenses raised by petitioners. FSLIC

promptly removed Gibraltar Savings' suit against petitioners to federal court. The Federal Deposit Insurance Corporation (FDIC) succeeded FSLIC as receiver when FSLIC was abolished in August of 1989. First Gibraltar then intervened to enforce its right to collect on the note. See Pet. App. A5-A6; 12 U.S.C. 1821a(a)(5) (Supp. IV 1992).

2. In January of 1991, the FDIC moved for summary judgment, arguing that petitioners' counterclaims were barred under 12 U.S.C. 1821(i)(2) (Supp. IV 1992), because the Federal Home Loan Bank Board (FHLBB) had determined that the receivership estate would not have sufficient assets to make payments to unsecured creditors. Although the FDIC served its motion on petitioner Sowell, it neglected to serve its motion on petitioners Ogg and Foxwood Management. When none of the parties objected to the summary judgment motion, the district court granted the motion in February of 1991; the court gave notice to all of the parties of its order. Although petitioners received that notice, they did not object at that time to the FDIC's failure to serve them. Instead, they "allowed the balance of the case pending before the district court to proceed for over a year without raising this lack of notice issue in the district court." Subsequently, First Gibraltar filed a motion for summary judgment on its claims, which the court granted in April of 1992. See Pet. App. A6-A7, A18, B1-B4 (summary judgment in favor of FDIC), C1-C5 (summary judgment in favor of First Gibraltar).

3. The court of appeals affirmed. Pet. App. A1-A31. The court rejected petitioners' argument that the district court committed reversible error in granting summary judgment notwithstanding the FDIC's

failure to give notice of the motion to all of the parties. *Id.* at A9-A18. The court first concluded that the district court "clearly erred" in granting summary judgment, because the failure to give notice violated Fed. R. Civ. P. 56(c). Pet. App. A11.

Stating that it should reverse unless the error was "plainly harmless" (Pet. App. A12), the court proceeded to consider that question. *Id.* at A12-A18. The court explained that "errors in notice are only harmless where the unnotified party has no meritorious legal claim or no legal claim that could be meritorious with development of the record." *Id.* at A12. The court then concluded that neither of petitioners' challenges to the district court's conclusion established a basis for overturning the district court's judgment. *Id.* at A13-A18. First, the court rejected the argument that "continuing change in the financial condition of Gibraltar Savings" might produce sufficient funds to allow petitioners to recover on their claims. *Id.* at A13-A17. The court explained that a claim against the FDIC as receiver is limited to "the amount that claimant would receive if the failed institution were liquidated and its claims paid according to the preference rules of the state in which the institution is located." *Id.* at A14-A15. Further, the amount of that liability is "fixed" on "the day that the FHLBB determines that an institution is insolvent," and "the FHLBB's determination of insolvency and the worthlessness of unsecured creditor claims is binding and cannot be collaterally attacked in claims against the FDIC." *Id.* at A15. Because the FHLBB had determined in 1988 that Gibraltar Savings was insolvent and would not have assets to pay "the claims of depositors or

secured creditors, let alone unsecured creditors," and because petitioners did not challenge the accuracy of that determination, any possible change in the financial condition of Gibraltar Savings would have no legal effect. *Id.* at A16-A17.

The court also rejected petitioners' contention that the failure of notice prejudiced them by depriving them of an opportunity to use their counterclaims to offset their liability to First Gibraltar. Pet. App. A17-A18. The court explained that "[t]he right of offset is inapplicable here because the FDIC does not hold [petitioners'] note against which the claims would be offset. Thus, [petitioners] have no right to offset their liability on the note held by First Gibraltar by counterclaims against the FDIC." *Ibid.* (citations omitted).

The court also rejected petitioners' challenges to the district court's grant of summary judgment in favor of First Gibraltar on its claim to collect the unpaid balance of the note. Pet. App. A18-A31.

ARGUMENT

Petitioners contend in their first two questions presented (Pet. 12-26)[1] that the court of appeals should have overturned the summary judgment the district court granted in favor of the FDIC. That contention is meritless.[2]

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[1] The third and fourth questions presented (Pet. 26-45) challenge the grant of summary judgment to First Gibraltar. Because the FDIC has no direct interest in those questions, we do not address them in this brief.

[2] Those questions affect only Foxwood Management and Ogg, because Sowell was served with the motion in question. See Pet. App. A6.

1. Petitioners first argue (Pet. 12-16) that the proceedings below did not comport with procedural due process. That claim, however, was neither presented to nor decided by the court of appeals, and accordingly is not properly before this Court. *E.g.*, *Zobrest* v. *Catalina Foothills School District*, 113 S. Ct. 2462, 2466 (1993).

2. Petitioners also contend (Pet. 16-20) that the court of appeals erred in declining to reverse the judgment of the district court, because failure to give the notice of summary judgment required by Fed. R. Civ. P. 56(c) can never be harmless. Petitioners further argue that the Fifth Circuit's decision that such an error can be harmless conflicts with the decisions of other courts of appeals.

Those arguments are incorrect. Rule 56(c) of the Federal Rules of Civil Procedure provides that a "motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." Although that Rule plainly was violated by the defective service in this case, such an error does not automatically require reversal of the district court's judgment. In light of the conclusion of the court of appeals that petitioners have neither a "meritorious legal claim," nor a "legal claim that could be meritorious with development of the record," Pet. App. A12, a remand to the district court to give petitioners ten days to build a record would be pointless. The rule of automatic reversal sought by petitioners is inconsistent with the spirit of "just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1) that animates the Federal Rules.

Nor does the decision of the court of appeals conflict with the decisions of other courts of appeals.

None of the decisions on which petitioner relies involve the kind of error at issue here, *i.e.*, failure of the movant to serve one of the nonmoving parties. Rather, they involve instances where a court granted summary judgment without waiting ten days after the motion was served,[3] or where a court granted summary judgment *sua sponte* without giving the losing party ten days' notice.[4] And even in those contexts, petitioner does not identify any court of appeals that has adopted a rule requiring automatic reversal. In fact, the courts have declined to adopt such a rule, both where the failure to wait ten days occurred in response to a party's motion,[5] or where

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[3] See *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219, 223 (2d Cir. 1980).

[4] See *United States Development Corporation* v. *Peoples Federal Savings and Loan Association*, 873 F.2d 731, 735 (4th Cir. 1989); *National Expositions, Inc.* v. *Crowley Maritime Corporation*, 824 F.2d 131, 133 (1st Cir. 1987); *Yashon* v. *Gregory*, 737 F.2d 547, 551-552 (6th Cir. 1984), cert. denied, 486 U.S. 1032 (1988).

[5] At least four courts of appeals have accepted the propriety of harmless error analysis in cases where the district court responded to a properly served summary judgment motion without waiting ten days. *Melanson* v. *Caribou Reefers, Ltd.*, 667 F.2d 213, 214 (1st Cir. 1981) (affirming grant of summary judgment on less than ten days' notice where "noncompliance with rule 56(c) [w]as a procedural *damnum absque* any substantive *injuria*"); *Harrington* v. *Vandalia-Butler Board of Education*, 649 F.2d 434, 436 (6th Cir. 1981) ("[F]ailure to comply with the ten-day requirement of Rule 56(c) is subject to the harmless error rule."); *Ikerd* v. *Lapworth*, 435 F.2d 197, 203 (7th Cir. 1970) (summary judgment affirmed because appellant failed to show "specific * * * prejudice" resulting from the defect in notice); *Kelsey* v. *Minnesota*, 565 F.2d 503, 506 n.2 (8th Cir. 1977) (affirming grant of summary judgment

the court failed to provide adequate notice of its own intentions.[6] Thus, although there are some differ-

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on less than ten days' notice as "harmless error"); see 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2719, at 10-11 (2d ed. 1983) ("[I]f the motion is served less than ten days before the hearing but no prejudice appears to have occurred, proceeding with the summary judgment motion still may be proper.").

There is some tension between those decisions and the Second Circuit's decision in *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219, 223-224 (1980), on which petitioners rely (Pet. 17). In *Winbourne* and *Gutwein* v. *Roche Laboratories*, 739 F.2d 93, 95 (1984), the Second Circuit expressed the view that a district court's grant of summary judgment without waiting ten days after the motion was filed could be harmless only in cases in which "the ten day notice is impractical, and it is absolutely clear that the non-moving party suffered no prejudice from a shortening of the period." *Gutwein*, 739 F.2d at 95. The situation at issue in those cases—in which the nonmoving parties interposed a contemporaneous objection to the action of the district court—is quite different from the situation here, where petitioners allowed the case to proceed for more than a year without raising the notice problem. Accordingly, those decisions do not offer a substantial indication as to how the Second Circuit would analyze a case like this one.

[6] At least six of the courts of appeals have accepted the propriety of harmless error analysis in cases where a district court grants summary judgment *sua sponte* without giving the parties ten days' notice. See, *e.g.*, *Davis Elliott International, Inc.* v. *Pan American Container Corp.*, 705 F.2d 705, 708 (3d Cir. 1983) (summary judgment entered *sua sponte* without ten days' notice subject to reversal only if "there is any state of facts on which the [nonmoving party] could conceivably recover"); *Powell* v. *United States*, 849 F.2d 1576, 1582 (5th Cir. 1988) (error is harmless if "the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact"); *Milwaukee Typographical*

ences of opinion in different courts of appeals regarding the circumstances in which notice errors can be harmless, there is no reason to accept petitioners' contention that other courts of appeals would have rendered a decision in this case different from that made by the court below.

Union No. 23 v. *Newspapers, Inc.*, 639 F.2d 386, 391 (7th Cir. 1981) ("[W]here no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed."); *Kaestel* v. *Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984) ("noncompliance [with Rule 56(c)'s notice requirement] in limited circumstances may constitute harmless error"; affirming summary judgment after concluding that noncompliance was harmless); *Portsmouth Square, Inc.* v. *Shareholders Protective Committee*, 770 F.2d 866, 869 (9th Cir. 1985); *Capuano* v. *United States*, 955 F.2d 1427, 1432 (11th Cir. 1992) (*sua sponte* summary judgment without ten days' prior notice permissible if lack of notice "harmless").

None of the three *sua sponte* summary judgment cases on which petitioners rely (see note 4, *supra*) held that failure of the court to give ten days' notice would require reversal in all cases. The Fourth Circuit in *United States Development Corporation* noted that "extraordinary circumstances may justify departures from the ten-day notice requirement." 873 F.2d at 735 n.3. The First Circuit in *National Expositions, Inc.* affirmed the grant of summary judgment based on the appellant's failure to show any genuine issue of material fact. 824 F.2d at 133-135. Finally, the Sixth Circuit in *Yashon* reversed a *sua sponte* summary judgment that was granted at a time when counsel for the nonmoving party apparently had been advised by the district court that he need not file a brief regarding the substantive issues involved in the case until the district court ruled on certain pending discovery motions. 737 F.2d at 552-553. That procedural irregularity on the part of the district court does not resemble the situation involved here.

3. Finally, petitioners contend (Pet. 21-26) that the lack of notice was not harmless in this particular case. On that point, petitioners suggest only that if they had received notice they could have demonstrated that subsequent changes in the financial condition of Gibraltar Savings might have changed the solvency of the receivership estate. See Pet. 25-26. They do not, however, challenge the conclusion of the court of appeals that any such change would be irrelevant to their claims because the liability of the receiver is "fixed" based on the status of the estate on the date on which the FDIC is appointed. Pet. App. A15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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